

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

NEFTALI BAJANDAS,

Respondent.

**Docket No. FMCSA-2007-28852¹
(Eastern Service Center)**

FINAL ORDER

1. Background

On May 31, 2007, the Massachusetts Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Neftali Bajandas (Respondent).² The NOC, which was based on a May 15, 2007 compliance review of R & F Transportation Co., Inc., charged Respondent with one violation of 49 CFR 382.501(a)—performing a safety sensitive function after engaging in conduct prohibited by 49 CFR part 382, subpart B. According to the Statement of Charges attached to the NOC, Respondent operated a commercial motor vehicle in commerce on March 14, 2007 after testing positive for opiates on a post-accident controlled substances test and not being evaluated by a substance abuse professional.³ The NOC proposed a civil penalty of \$840.

¹ The prior case number was MA-2007-0079-US0411.

² Exhibit A to Motion for Default and Final Order.

³ However, the requirement that a driver be evaluated by a substance abuse professional does not apply until after a driver tests positive for a controlled substance. As discussed, *infra*, Respondent's positive test result was not verified until March 20, 2007. Consequently, Respondent was under no obligation to have been evaluated by a substance abuse professional on March 14, 2007.

In his response to the NOC, Respondent contested the charge and requested to submit evidence and argument without a hearing.⁴ Respondent stated "I will present evidence in my behalf...I have never taken drugs in my entire life, the truth will come to light."

On August 22, 2007, the Field Administrator for FMCSA's Eastern Service Center (Claimant) filed a Motion for Order of Default and Final Order. Claimant moved for entry of an order of default declaring the NOC (including the civil penalty) as the final order in the proceeding because Respondent's reply did not state the grounds for contesting the claim and contained a general denial without setting any material facts in dispute. Therefore, according to Claimant, the response to the NOC was so deficient as to constitute no reply at all. In the alternative, Claimant moved for a final order based on evidence he submitted in support of the violation and the civil penalty calculation. Respondent did not reply to the motion.

2. Decision

A. Motion for Default Order

Claimant is correct that under § 386.14(d)(1) of the Rules of Practice, a mere general denial of the claims in the NOC may result in a default being entered by the Agency decisionmaker upon motion by the Field Administrator. However, Respondent did more than generally deny the alleged violation. His claim that he had never taken any drugs was an implicit challenge to the validity of the post-accident controlled substances test upon which the violation was based and he indicated that he would present evidence

⁴ Exhibit B to Motion for Default and Final Order. Although the handwritten response is undated, Claimant stated that it was timely served.

to support his claim.⁵ On its face, this allegation constitutes a potentially meritorious affirmative defense sufficient to overcome a finding of default. Accordingly, Claimant's motion for entry of a default order is denied.

B. Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.⁶ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Notwithstanding Respondent's failure to show any material facts in dispute, Claimant must establish a *prima facie* case; in other words, he must present evidence clearly establishing all essential elements of his claim.⁷ If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.⁸

1. The Violation

Under 49 CFR 382.501(a), no driver shall perform safety sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of part 382. Section 382.213 of subpart B prohibits a driver from

⁵ Respondent was not required to submit such evidence with his reply to the NOC. Under § 386.16(a)(2), a respondent must submit its written evidence not later than 45 days following service of Agency Counsel's written evidence and argument.

⁶ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993, Order, December 5, 1991.

⁷ *Id.*

⁸ *Id.*

reporting for duty or remaining on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance.⁹ Claimant submitted into evidence a Commercial Vehicle Accident Brief prepared by Trooper Paul Powell of the Massachusetts State Police which states that Respondent was traveling southbound on Route 495 North at approximately 3:00 a.m. on March 14, 2007 when he fell asleep, causing his vehicle to exit the highway and roll over.¹⁰ Claimant also submitted: (1) the collector copy of the Federal Drug Testing Custody and Control Form indicating that Respondent was tested for controlled substances at 10:08 a.m. on March 14, 2007; and (2) the written results of that controlled substances test, verified by the medical review officer on March 20, 2007, showing that Respondent tested positive for opiates.¹¹ Accordingly, I conclude that Claimant established a *prima facie* case that the violation occurred as alleged. Although Respondent indicated he would submit written evidence supporting his denial of the charges, he failed to serve such evidence within 45 days of submission of Claimant's evidence, as required by § 386.16(a)(2). Consequently, Respondent has not rebutted Claimant's *prima facie* case and the motion for final order is granted with respect to the violation.

2. The Civil Penalty

With respect to the proposed \$840 penalty, Claimant contended that the penalty was calculated to induce further compliance while taking into account the factors

⁹ The only exception to this prohibition is when use of the controlled substance is pursuant to instructions of a licensed medical practitioner who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle. Respondent did not allege that this exception applied to him.

¹⁰ Exhibit D to Motion for Default and Final Order.

¹¹ Exhibit E to Motion for Default and Final Order.

required by 49 U.S.C. § 521(b)(2)(D)¹² and attached a copy of the Individual Uniform Penalty Assessment Worksheet (UPA Worksheet) used to calculate penalties against drivers.¹³ Although Respondent did not challenge the penalty calculation, I note that the UPA Worksheet assessed Respondent one point for the History factor even though he had no history of prior enforcement actions. In effect, therefore, Respondent was penalized for having a clean record. This makes little sense. No points should have been assessed for this factor.¹⁴ Accordingly, I am reducing the amount of the civil penalty to \$750, which represents the "Low Range" on the UPA Worksheet.

THEREFORE, *It Is Hereby Ordered*, that Respondent shall pay to the Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$750 for one violation of the Federal Motor Carrier Safety Regulations. Payment may be made electronically through the Federal Motor Carrier Safety Administration's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order should be remitted to the

¹² These factors include the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other factors as justice and public safety may require.

¹³ Exhibit C to Motion for Default and Final Order.

¹⁴ See *In the Matter of Dulcidio Santiago*, Docket No. FMCSA-2008-0134, Final Order, December 7, 2009.

Eastern Field Administrator at the address shown in the Certificate of Service.¹⁵



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-21-10
Date

¹⁵ Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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